

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically at the time and date indicated, which may be materially different from its entry on the record.



Dated: 02:53 PM April 3, 2012

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:

DAVID LEROY SMITH AND
STEPHANIE ELIZABETH SMITH,
Debtors.

) CHAPTER 13
)
CASE NO. 11-61791
)
JUDGE RUSS KENDIG
)
)
**MEMORANDUM OF OPINION (NOT
INTENDED FOR PUBLICATION)**
)

Debtor's unopposed, amended motion to disallow the prepetition arrearages is before the court. Debtors request the court to disallow any arrearage claim owed to CitiMortgage/CitiFinancial/One Main Financial due to the creditor's failure to file a claim.

The court has jurisdiction of this case under 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984. In accordance with 28 U.S.C. § 1409, venue in this district and division is proper. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

FACTS

On May 26, 2011, Debtors filed a joint chapter 13 petition. According to Schedule D, CitiMortgage held a mortgage on Debtors' residential real estate located at 279 Whetstone St.,

Bucyrus, Ohio. The chapter 13 plan filed with the petition identified CitiFinancial as the creditor with the first priority lien on the real estate, as well as a \$4,000.00 estimated arrearage claim. Debtors intended to cure the arrearage and maintain regular monthly payments to the mortgage holder. The plan was confirmed on July 28, 2011.

On February 12, 2012, Debtor filed the first motion to disallow the arrearage claim owed the mortgage holder and to declare the mortgage current. The motion was amended, resulting in the third amended motion now before the court. Debtors request the court disallow the arrearage claim because the creditor did not file a proof of claim setting forth the amount owed.

ANALYSIS

Debtors cite no authority for their request. For the reasons that follow, the motion to disallow the arrearage claim will be denied.

First, the court notes that CitiMortgage, Inc. filed a proof of claim on March 20, 2012. The claim includes an arrearage claim of \$5,074.78.

Second, the confirmed plan proposed to pay \$4,000.00 in arrearages on the mortgage. Under the form plan, an arrearage claim is payable as set forth by a debtor. The form plan states that “the amount, but not the rate, is subject to any timely, contrary proof of claim.” (Original Chapter 13 Form Plan, ¶ E4). The implication is that if no claim is filed, the amount set forth by the debtor controls. Without further support or argument, a debtor make a statement as to the existence of an arrearage and then seek to disregard that statement when convenient. Further, Debtors failed to address the res judicata effects of the confirmed plan on their request to disallow the mortgage arrearage claim.

Third, disallowing an arrearage claim may result in an impermissible modification the mortgage on Debtors’ residence in contravention of 11 U.S.C. § 1322.

Fourth, the court questions service of the motion on the mortgage holder. Debtors have identified three entities: CitiMortgage, CitiFinancial, and One Main Financial, in various pleadings related to the arrearage. The motion alleges that Debtors served the mortgage holder at a correspondence address provided by the creditor to counsel. The address is a post office box in Texas and the court is not convinced that service would meet the service requirements of Federal Rule of Bankruptcy Procedure 9014, 7004 or Federal Rule of Civil Procedure 4.

In light of the above, the motion will be denied by separate order.

It is so ordered.

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